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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 864

ROBERT P. BURRUSS, VIRGINIA R. BURRUSS, JAMES C. TENNANT, JAMES L. TENNANT, *et al.*,

Appellants,

—against—

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, HARRISONBURG DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Opinions Below

The decision of the District Court for the Western District of Virginia, Harrisonburg Division (three-judge Court) is unreported and appears in Appendix A. The opinion of the same Court denying the Defendants' Motion to Dismiss and referring the matter to a three-judge Court is also included in Appendix A.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

(i) This is a civil proceeding alleging that the State of Virginia, in violation of the equal protection clause of the 14th Amendment, has improperly established and maintained a public education system which denies to Appellant children, residing in Bath County, Virginia, an educational opportunity equal to that received by children in other sections of the State, as more fully detailed below. Appellants contend that the distribution of school funds by the State of Virginia as set forth in Chapter 806 of the Acts of Assembly, 1968, particularly items 555, 556, 557, 558, 560, 562, 563 and 564 deny equal protection of the law. See Appendix B.

(ii) Appellants seek review of the ruling of the three-judge District Court dismissing the action, decided May 23, 1969, and filed with the Clerk of the District Court for the Western District of Virginia, Harrisonburg Division on May 27, 1969. The Notice of Appeal was filed on July 21, 1969. The time within which to docket the appeal was extended by Justice Potter Stewart until October 20, 1969, and further extended by Chief Justice Warren E. Burger until November 19, 1969.

(iii) Jurisdiction of the appeal is conferred on the Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Brown v. *Board of Education of Topeka*, 347 U.S. 483 (1954);

Griffin v. *Illinois*, 372 U.S. 353 (1963);

Harper v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

(v) The validity of Chapter 806 of the Acts of Assembly of Virginia 1968, and specifically items 555, 556, 557, 558, 560, 563 and 564 are in contention. They are set forth in Appendix B.

Questions Presented

1. Whether *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. *McInnis* v. *Oglivie*, —— U.S. ——, 89 S. Ct. 1197 (1969), authorizes the State of Virginia to establish and maintain dual school systems in the State—an inferior one in poverty-stricken areas and a superior one in wealthier districts?

2. Whether Appellant children are denied equal protection of the law when the State of Virginia establishes, maintains, and supervises one group of schools which is financially able and superior and another group of schools within the same state which is markedly poorer and inferior.

Statement of the Case

1. *When and How the Federal Questions Were Raised and Decided Below*

Appellant's Complaint charged that the method of apportionment of Virginia funds for schools throughout the State constituted a denial of equal protection. At the proceeding before the one judge district court, in which the motion to dismiss was denied and the case referred to the three-judge court, the federal questions were raised again. Similarly, these issues were raised in the briefs and arguments

before the three-judge court which dismissed the action. Both opinions, showing the raising of the issue of denial of equal protection, are set forth in Appendix A.

The equal protection issue is elaborated in the complaint. The complaint alleges and the transcript* demonstrates that the State of Virginia has violated the Equal Protection clause of the Fourteenth Amendment in the manner in which it has fulfilled its duty to establish and maintain a public school system in Virginia, in that enormous disparities have developed because of the way in which State funds have been allocated and particularly in the application of the Basic State Formula for the distribution of State funds. As a result of this denial of equality Appellants and their children, as well as others in areas similarly poor, are treated adversely as compared with individuals in other sections of the State.

The complaint seeks a declaration that the apportionment of state money for education amongst the counties is void and repugnant to the equal protection clause. Further sought is the retention of the cause by the Court until the General Assembly of Virginia acts to correct the constitutional deficiencies, with the Court acting only when Virginia fails to correct the inequalities.

2. *Facts*

The duties of the State in education are established by the Virginia Constitution. Section 129 requires the General Assembly to establish and maintain an efficient public school system. Section 130 places supervisory authority in the State Board of Education. Under Section 132 the State

* References marked "Tr." refer to the transcript of the deposition taken by appellants and admitted into the record by consent.

Board is directed to divide the State into districts of not less than County size. Local school boards are provided for in Section 133. The General Assembly has the power to consolidate districts. Section 135 provides for the authority of the General Assembly to fund the schools, and this section indicates the specific funds from which the money is to come, but importantly gives the General Assembly the power to make appropriations in addition to those coming from the specific funds.

Pursuant to Section 136, local districts are authorized to "raise additional sums," with the method of taxing restricted to taxes on property. In its session in 1968, the General Assembly of Virginia, chapter 806, item 564 sets forth the basic state aid formula of 60% reimbursement of teachers' salaries, based upon an average daily attendance of 30 pupils per teacher in elementary schools, and 23 per funds have been allocated, and particularly in the applica- teacher in secondary schools.

Chapter 806 also provides that the State will pay 60% of the salaries for guidance counsellors (item 555); supervisors (item 557); and principals (item 560), but only in the event that the programs have been initiated by the county with county money (Tr. 23, 27).

For the school year 1967-8, the total educational budget in Bath County provided for expenditures slightly in excess of $499,000.00, of which the State paid slightly more than $173,000.00 (about 34% of the total) and Bath County somewhat over $256,000.00, the balance being supplied by the Federal Government (Tr. 35). Over the years since 1961 the State contribution has risen only slightly while the costs have risen substantially. In 1963 the County effort was $197,000.00; most recently the figure

for local effort rose to $327,000.00 (Tr. 23-25, 35). From every tax dollar the County collects, 82¢ was spent on education (Tr. 23).

The record shows that Bath County has been designated an "Appalachia County" because of its poverty (Tr. 21). For example, the median income for Bath is $3,218.00, as compared to $4,964.00 for the state; 46% of the families live on incomes of $3,000.00 or less (Tr. 27). Although the County is fourteenth in the State in average wealth per child (Tr. 51), this figure is due solely to the approximately 25% of the taxable value of the entire County that is chargeable to one resort hotel, the well-known Homestead Hotel (Tr. 95). Because of the poverty of the people generally, the County is unable to obtain any more revenue by local effort (Tr. 26); 82% of local funds already goes to schools (Tr. 26). Furthermore, the budget for 1969-70 provides that 93% of every local tax dollar be spent on schools (Tr. 104).

Additional effort for schools is essential because the school cost per child in Bath County over the years recently has risen from $320.00 to $481.00 (Tr. 26) with very little increase in aid from the State (Tr. 23-6).

Basically the assistance from the State comes from a reimbursement of 60% of the salaries paid to teachers, with the remainder given for certain special purposes (Tr. 28, 130, Chapter 806, 1968 Acts of Assembly, item 564). But Bath County is the ninth worst county in the State in number of substandard teachers (Tr. 18). Under the State formula for reimbursement of 60% of the teachers' salaries, counties able to pay higher salaries, of course, receive more money. Although effort is made to recruit competent teachers from many areas, Bath cannot

compete with other counties in the State because of the difference in salary schedules (Tr. 19).

What is more, poor counties such as Bath are not fully reimbursed by the State for teacher salaries because their school population is widely dispersed. State aid to counties is based upon the Average Daily Attendance (ADA) of 30 children per class in elementary school, and 23 per class for high school (Tr. 45, 16, 130). Being a poor, rural, widely-dispersed, sparsely-populated county, divided by mountains (Tr. 14), class sizes do not even qualify for minimum reimbursement. Thus the State pays for 60% of the salaries of only 37 out of a total of 53 teachers (Tr. 15-16); no reimbursement exists at all for 16 teachers, who must be paid for entirely by local effort.

Bath cannot afford a visiting teacher, nor can it afford necessary supervisory personnel (Tr. 15). Its health services are inadequate (Tr. 23, 27). While there would be some receipt of State money for these programs, if the County had them, the poverty of the County cannot produce the basic money to initiate the programs (Tr. 15, 73-74). Lack of significant State assistance thus hurts the educational system of "poor counties" (Tr. 125).

Taken for granted in many schools of the State and country, are important subjects not available to the children of Bath County. For example, no effective technical education is available to the children of Bath (Tr. 73, 74). There is a "dire need," for "technical schools to help in trades" (Tr. 113). Because of the lack of technical trade training, many children drop out to go to work for the Homestead Hotel at non-skilled jobs such as caddying (Tr. 78). The drop-out rate for the children of Bath County is the second highest in the State (Tr. 27, 33).

Not only is there a lack of technical training available to the children, but the regular courses are seriously deficient as compared to offerings elsewhere in the State. At the two high schools in Bath County, there are 39.5 units (Tr. 8). The average in the rest of Virginia is 62.8 units, with Fairfax County having 137 units (Tr. 30-31). As a result, Bath County is at, or very near, the bottom of the entire State (Tr. 31-32). (See Record Exhibit 5b, Table 3, for course offering of schools throughout the State.)

As might be expected from the above facts the number of children going on to college in this County is very low; 48% of the children of the various counties of the State go on to college; in Bath County the figure is only 29% (Tr. 33-34). So limited is this education that the children of Bath are not eligible to attend many Virginia colleges and universities, including State educational institutions of higher learning (Tr. 79).

Further, the State aid formula does not provide even minimally for construction costs for new and additional needs. Though the State is fully aware of such needs, this effort must be made by the County on its own (Tr. 147; see letter from State Superintendent of Public Instruction, Dr. Woodrow W. Wilkerson, Tr. 7-11).

Called as an expert witness by plaintiffs, Prof. Samuel Alexander, Jr. described the inequalities created by Virginia. After examining the facts in Bath County, Prof. Alexander answered in the affirmative to the question ". . . Bath County is discriminated against by the State because of its poverty?" (Tr. 130). It was his opinion that the children of Bath County "have a lower educational opportunity than in other parts of the State" (Tr. 131). He further pointed out that the State has set up in the

districts the very inequities and disparities that exist today (Tr. 120-1). The County Superintendent of Bath concluded "... it is impossible for us to provide those services and our students suffer all the way through school" (Tr. 38).

THE QUESTIONS ARE SUBSTANTIAL

1. Establishing and maintaining a dual public school system with substantial inequalities based upon poverty is constitutionally impermissible, and judicially correctible, and therefore not governed by *McInnis* v. *Ogilvie*.

While the Court below believed to the contrary, we urge that nothing in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd sub nom. *McInnis* v. *Ogilvie*, —— U.S. ——, 89 S. Ct. 1197 (1969), authorizes Virginia to establish and maintain a dual system of schools based upon poverty which discriminates against the poor.

We are concerned in this case with the objective criteria of constitutionally improper discrimination, such as the construction of buildings, the number of courses or units offered, whether technical training is offered, whether the County is so poor that it cannot hire and pay for properly trained teachers, whether it can afford necessary supervisory personnel, and other such concrete matters within the knowledge of the State. *McInnis* to the contrary was concerned with more subjective matters. Paragraph 18 of the *McInnis* complaint for example is concerned with the different levels of "educational attainment" and "educational achievement of the children." Paragraph 1 of the same complaint speaks of the "educational needs" of the children. These criteria may vary as to each child, and

may be beyond the capacity of courts to respond to judicially. But whether technical courses are available only in some counties or whether the basic State formula for reimbursement encourages richer districts to have more qualified teachers are observable and justiciable matters. The factors upon which this case depends are matters of public information.

The Complaint in this case is framed in demonstrable equal protection terms. Paragraph 11 alleges "substantial disparities between Bath County and other localities" because of "the method adopted by the State in its apportionment of State Funds and particularly the formula employed to distribute the State Funds among the localities of the State." The result has adversely affected "the extent of available educational facilities and services." Paragraph 13 of this Complaint alleges that as a result of this system "children attending public schools in Bath County, . . . are denied educational opportunities which are substantially equal to those enjoyed by children attending public schools in many other districts of the State, . . ." Paragraph 14.2 states that the State formula "fails to correct marked differences in the quality of public school buildings, equipment and other facilities, which exist among the public schools . . . as a result of the inequitable apportionment of State monies . . . in past years." Paragraph 15 makes more specific the deficiencies resulting from the inequitable distribution of money for many years by Virginia. Finally, demands for relief here, unlike those in the *McInnis* complaint, are concerned with objective criteria causing inequality of educational opportunity and not with personalized "needs" of children.

Moreover, the level poverty of the area is never mentioned in the *McInnis* amended complaint. The complaint is that the children do not possess normal reading and mathematical skills. Personalized needs may not be justiciable, but the lack of objective items, trained teachers and technical courses is justiciable. The Court below found it could not "tailor the public moneys to fit the varying needs of these students throughout the State." App. 5a. But the phrase "varying needs of these students" misunderstands the very difference between *McInnis* and this case. Nowhere are we concerned about the varying needs of pupils. In this case there is no insistence that the presence of the objective factors will produce excellent students, merely that the opportunity to study and learn should not be denied when it is available in other sections of the State.

Had Virginia maintained a school system openly favoring the economically well-to-do areas of the State, as it once maintained a school system based upon race, beyond doubt that system could not have withstood constitutional attack, and this Court would have no trouble with the question of justiciability. We have in reality such a system, with poverty instead of race the factor producing the discrimination.

As in the case at bar, the lower court ruling in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), had similarly seen the evil, but felt it was not judicially correctable. To that, this Court made its now historic response:

> "Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . .

> Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made to all on equal terms.*" *Id.* at 493 (emphasis supplied).

In point of fact, we are not concerned here with the quality of Virginia education, except in so far as it is not provided to all on a substantially equal basis. When the action of the State leads to a dual system based upon poverty, when State action discriminates against the poorer areas of the State, equal protection issues are presented requiring the assistance of the federal courts.

In Virginia the responsibility for public education is not a shared responsibility between the State and County, as one might suppose from the opinion of the Court below. Education is clearly the duty of the State. (See Article IX Section 129). What the County may do, should it choose, is supply "additional" funds. (Article IX Section 136). But the responsibilities have been reversed. Education has become the responsibility of the County, with the State offering assistance, not the reverse. The result is the creation of a discriminatory system based upon poverty, and thereby denying equal protection of the law. "A State, of course, has a wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, . . .", but "the object must be a constitutional one. . . ." *Griffin v. County School Board*, 377 U.S. 218, 231 (1964). Here the inequalities that have developed are not constitutional.

Citing *McInnis* v. *Shapiro*, *supra*, the three-judge Court, aware of facts of record, nevertheless dismissed this action. In doing so, however, it observed that the deficiencies of the Bath County school system are acknowledged. "They are not and cannot be gainsaid." App. 4a. And notably, while rejecting this case, the lower court found, "We can only see to it that the outlays on one group are not invidiously greater or less than that of another. No such arbitrariness is manifest here." App. 5a. For the reasons we will urge below, the test of "arbitrariness" as relied on by the lower court is not the applicable test to be applied in this matter.

2. Virginia has established and maintained an educational system that inevitably denies equal protection of the law to poor districts such as Bath County, where appellants reside.

What constitutes an "efficient" public school system is a State question, not the concern of this case. Nor are we raising here the issue of whether the State *must* maintain a *free* public school system, a question raised in *Griffin* v. *County School Board*, 377 U.S. 218, 231 (1964). Whether or not the State having instituted such a system, must continue such a system, is similarly not before us.

Having assumed such a responsibility, however, and not having discontinued it, may the State create a school system which shifts the major part of that State responsibility to the State-created and supervised county districts having substantially unequal economic abilities to accept those responsibilities? May the State system of financing schools be based on the criteria of wealth or poverty?

Having the duty to establish an educational system under its Constitution, may the State of Virginia knowingly give a relatively small part of the total cost of operating those schools of these County-districts, leaving it to the districts themselves to furnish the bulk of the funds (or whatever funds it can furnish), regardless of the needs of the schools of the district? Does a school system, delivering unequal education and causing great disparity in the schools throughout the State violate equal protection of the law?

(a) *Unjustified Disparities Were Contained in the Establishment of the Virginia Educational System*

First, it is important to note the extent to which Virginia law mandates state responsibility for education. Article IX, Section 129 of the Virginia Constitution requires the General Assembly to "establish and maintain an efficient system of public free schools throughout the State." General supervision of these schools is invested in a State Board of Education (Article IX, Section 131). In Section 132, the Constitution directs the Board to divide the State into divisions of not less than one county or city. Under Section 135 State money for schools "would be received from an annual tax on the property of not less than one nor more than five mills on the dollar, for the equal benefit of all the people of the State, to be apportioned on a basis of school population." Under this section other specified funds are set forth for the same purpose; in addition the Legislature has broad power to appropriate further moneys from the general funds of the State. Section 136 provides that Counties are authorized to raise "additional" sums by a tax on property at a rate to

be fixed by law. Title 22 138.1 of the Code of Virginia following Section 135 of the State Constitution minimally fixes a permanent tax of 10¢ for every $100.00 of assessed valuation to be apportioned on the basis of school population and to be appropriated at each biennial session of the General Assembly with the right of the General Assembly to make available additional general funds.

As the formula was in fact practiced for the distribution of State funds, it became transformed from a State maintenance concept to a County maintenance concept with the State subsidizing teachers' salaries by 60%. As a result counties are reimbursed for only a part of their teacher payrolls. Resulting inequities are felt throughout the county school system. For example, Bath children do not receive the courses to be eligible to enter state universities and colleges such as William and Mary (Tr. 79). The number of courses available to Bath children is among the lowest in the state.

More generally Virginia not only does not meet its obligation to maintain a public school system for all its citizens but, in fact, aids and encourages the richer areas of the State. Hiring more experienced teachers, paying higher salaries, gaining reimbursement for those higher salaries, the richer school districts created by the State give children a greater educational opportunity. Conversely the poorer districts, having inadequate funds and receiving little from the State, hire less skilled teachers (Tr. 18). Special funds are available for special purposes, but there is not the money to initiate those programs where funds are made available on a matching formula.

(b) *Virginia Has Improperly Continued a School System Denying Equal Protection of the Law*

Above we have seen how the basic Virginia system functions generally, how it determines the method of financing, what the administrative sub-divisions are, where the basic supervisory power lies, and how the results of this system are harmful to the poor. In the Statement of the Case, we have described some of the harmful effects. In no sense was this an accidental growth. The denial of equal protection through the creation of the dual system with poverty as the major factor, came from the methods of financing schools at issue here.

Nothing in the Constitution of Virginia, however, has ever prevented it from making the system more equitable. Under this system Virginia could have appropriated sufficient funds so that the disparities between richer and poorer county school systems would be substantially smaller; the problem might not then be of a constitutional dimension. Instead of transferring the burden to the local districts it created, for example, it could have paid for the basic system, perhaps leaving it to the districts to make some additions or modifications. Although assuming the duty of maintaining a free school education, Virginia instead passed this burden in major part to the districts. Virginia thus initiated and then perpetuated the inequalities and disparities which a state-wide system would hope to minimize instead of increase.

In the case of Bath County, and similarly situated poor areas, the disparity is below any reasonable or rational level. From the facts we have shown as to the conditions of the schools—the teachers, the facilities, the courses offered, the ability of children to enter college

and the drop-out rate—the children of these poverty areas are doomed to lack of training and to perpetual poverty.

On many occasions this Court has recognized that distinctions based upon poverty are constitutionally invidious. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). In the case at bar the educational opportunity of a child is dependent, not on his efforts and skill, but on how rich his county is. Virginia may have the right to have a bad school system, it may have the right to have, perhaps, any kind of system it desires, but it cannot maintain of its own creation which is part rich and part poor.

In *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), this Court in examining the closing of schools in that Virginia county could have expressed the view that the school closing applied equally to whites as well as blacks, since in a limited literal sense this was so. Instead this Court recognized the reality of the situation and said, "Closing Prince Edward's schools bears more heavily on Negro children. . . ." 377 U.S. at 230. The reality here is that the State has initiated a school system whose adverse effects bear "more heavily" on poor children.

(c) *Virginia Maintains Unconstitutionally Different Educational Opportunities in Various Areas of the State*

The complaint, paragraphs 6-16, urged and the opinion acknowledged inequalities in educational opportunities, despite maximum effort by the County. Yet in looking at the Virginia funding system the Court said, "No such

arbitrariness is manifest here" because the outlays on "one group are not invidiously greater or less than that of another." (Below we shall discuss whether, in any event, the arbitrariness test is the proper one in a case such as this one.)

In our view the Court below fell into error because it narrowly saw that Bath and Fairfax Counties received approximately the same number of dollars per pupil from the State. Ignored by the Court, however, was the fact that the State Constitution placed the duty on the General Assembly to establish and maintain public education with supervision in the State Department of Education. Included among the powers was the right to designate administrative sub-divisions of not less than county size. Having designated the counties, Virginia apparently believes its duty thereby ends.

Nothing in the State Constitution transfers the educational duty of the State to the County. While permission is given to the counties to have programs of special interest, the supervisory power continues to lie with the State. Section 133 of the Constitution authorizes the General Assembly to merge districts in order to aid the State to carry out the duty to educate. Although the County may appropriate "additional funds" the primary duty is still the State's. The right of the County to appropriate additional funds does not of course alter the State's basic responsibility. No requirement that a County must appropriate any money for educational purposes appears in Virginia law. Yet Bath has been forced to appropriate more and more for vital items because the State has failed to do so. In the period of years when school costs heavily increased, the State increased its contribution $13,000.00,

while the County was forced to increase by $138,696.00. At a time when instructional costs increased 25%, the State increase was substantially less than 10%. The County contribution rose about 60% (Tr. 23-25). This failure on the part of the State has caused a dual system of schools with poverty as the governing factor.

When a condition of blatant inequality develops, it becomes necessary to look at the total picture to see whether or not constitutional issues are raised, and whether the State has failed in its duty to some. Only an examination of all the sums spent on the schools can reveal whether the State is carrying out its duty equally.

Let us suppose a debtor has two debts, and asks A and B to help pay them; A does and B cannot. The creditor in the A situation has no complaint, because his debt has been taken care of. But this is not true in the B situation. The creditor in the B situation is not satisfied although the debtor has given both A and B equal sums of money to pay a part of this debt. So it is with the children of the poorer areas. The obligation is the State's; the creditors are the children. When told to do so, Fairfax, for example, is well able to pay the State's obligation to the children; but Bath, for example, is not. The obligation of the State still remains. It reaches constitutional proportions when it results in patent unfair and unequal treatment.

The duty of the State is to educate. It may use the counties to help, but the State must supervise and manage education. Simply appropriating money and abdicating the remainder of that responsibility to maintain, supervise and manage is constitutionally improper when it produces great differences in educational opportunity

available to poor counties as compared with richer counties. When a dual system of schools results from such a system, it is no more permissible than a dual system based on race or religion, particularly when it produces the same kind of unfairnesses. *Brown* v. *The Board of Education of Topeka*, 347 U.S. 483 (1954).

Having the power to correct the inequalities, through rearrangement of the districts and through other formulas for appropriations while permitting the gross inequalities to continue, is constitutionally invidious and arbitrary. The view of the Court below that there was no invidious discrimination ignores the improper transfer of the responsibility for schools to the County from the State.

What the State appropriates is important, but is only a part of the question of whether the State is acting unconstitutionally in the way it is carrying out its duty to children. When the transfer of the responsibility from the State to the County results in the inequities that have in fact resulted, then we urge that the Court below was in error in looking at the problem solely from the view of the apparent equality of the sums the State gave to each county, and whether there was an invidious and arbitrary difference in that amount.

When the duty is the State's, perhaps the State may call upon the county to help, but the duty remains no less the State's, and the obligation to the children continues whether the county can or cannot help. When the county cannot pay enough, it is the State which has failed to educate children in an equal fashion; and the inequality is based upon the poverty of the area in which the children live. We

urge that this broader view of the obligation presents a more accurate picture of the arbitrary and invidious way the State carries out its duty, resulting in a discriminatory course of conduct and a dual system of schools.

(d) *In Addition to the General Discriminatory Conduct Described Above Virginia Further Increases the Discrimination by Special Acts Further Harming Poorer Areas*

Above we have attempted to show that the Virginia method of financing schools inevitably led to the inequalities described in the facts herein. In addition to this generalized improper course of conduct, Virginia enhances the richer areas of the State as follows:

(i) The basic formula for reimbursement to the County by the State is not a straight allotment of money according to the Average Daily Attendance. Instead the formula provides that the State pay for 60% of the sums spent for teacher salaries. Because of its poverty, 25% of Bath's teachers are without degrees. The average teacher salary is among the worst in the State. Counties able to hire more degree teachers by paying higher salaries thus receive the greater reimbursement.

(ii) The reimbursement formula fixing reimbursement on an average elementary school class of 30, and high school class of 23, means that a sparsely settled county is only partly reimbursed for its teacher payroll (Tr. 16). Bath is the sixth lowest County in terms of the ratio of State aid to its total school costs. Only 34% is paid by the State.

(iii) Reimbursement is provided to the County by the State for such items as visiting teachers and supervisory

personnel; but because of its poverty, Bath cannot initiate such programs, and thereby become eligible for State assistance. For this reason only one guidance counsellor exists for all the children (Tr. 69), and there is no technical training available (Tr. 74).

(iv) To all of this must be added the information that the State gives nothing for new construction, although the need is great as the State has recognized (Tr. 147, 7-11). To the richer areas the State will provide a lower rate of interest for the borrowing of money for construction; but if the County does not have the money to start such a program, no help is offered (Tr. 147).

Factors such as these led the expert witness, Prof. Alexander to conclude what we believe this Court must conclude:

> ". . . I say there is no doubt that the State system of school finance in Virginia perpetuates the inequities in educational opportunity and forms a vicious cycle that in turn perpetuates the cycle. Children are attending school with one-half the expenditure per pupil as in another part of the State, they either drop out or get an inferior education, then they in turn have lower aspiration levels in their children because of the same factors, they have a lower educational opportunity than in other parts of the State" (Tr. 131).
>
> ". . . the State has created inequities and disparities among the school districts among the children of Virginia. . . . The inequity exists because this entire system except for the Federal funds is created by the State Legislature of Virginia, a system that is and has almost twice as much per pupil in Arlington as it does for a pupil in Amherst and Bath County" (Tr. 120-1).

(c) *In Light of the Importance of Public Education, the Test of Arbitrariness in Judging the Conduct of the State Was Improper and the Test to Have Been Applied Should Have Required Virginia to Show the Compelling Necessity of the State to Discriminate Against Poverty Areas*

In their respective ways public education and public welfare are among the most important problems to which a state must direct its attention. While we believe, that the actions of Virginia were arbitrary in denying Equal Protection and that there is no reasonable basis upon which a discriminatory educational system may be maintained, nevertheless the "arbitrariness" test, as used by the Court below, was incorrect. The State should have been required to show the compelling necessity to maintain a system which does not supply education equally to all, as *Brown v. Board of Education, supra,* required. See *Shapiro* v. *Thompson,* —— U.S. ——, 89 S. Ct. 1322 (1969).

The Court below recognized the inequality of the Virginia educational system. It further recognized that this condition was not the fault of the County. Under these circumstances the State should have been required to show the compelling necessity for the continued existence of a system as full of disparities as the record herein shows.

CONCLUSION

This appeal raises issues of fundamental importance based on the denial of Equal Protection in education to school children. In light of the importance of education in modern American life the Court below did not properly consider the actions of the state of Virginia in denying a fundamental right. The issues are substantial and require the plenary consideration of this Court with briefs and oral argument.

Respectfully submitted,

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